ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
LARRY D. VAUGHT, JUDGE

DIVISION IV

CACR07-344

February 6, 2008

DAVID L. JOHNSON	APPELLANT	APPEAL FROM THE JOHNSON COUNTY CIRCUIT COURT [CR2005-149]
V.		HON. DENNIS C. SUTTERFIELD, CIRCUIT JUDGE
STATE OF ARKANSAS	APPELLEE	AFFIRMED

Appellant David Johnson entered a conditional plea of guilty to possession of marijuana with intent to deliver. On appeal, Johnson challenges the trial court's denial of his motion to suppress. We affirm.

The following evidence was introduced at the suppression hearing. On August 31, 2005, Officer Jason Daggs of the Arkansas State Police was patrolling I-40 east of Clarksville when he observed Johnson traveling eastbound in a white Chevrolet Malibu. Officer Daggs testified that he passed Johnson and pulled into the median to set up a radar patrol. As Johnson passed Officer Daggs in the median, he observed that Johnson was traveling extremely close to the vehicle in front of him. Officer Daggs pulled out of the median and followed Johnson for about one mile. During that time, Johnson continued to

follow behind the vehicle in front of him too closely. Officer Daggs then pulled up near Johnson, turned on his blue lights, and motioned for him to pull over.

Officer Daggs testified that he approached Johnson, advised him that he was pulled over for following too closely, and asked for his license and registration. Johnson produced a rental agreement for the vehicle. Officer Daggs testified that Johnson had difficulty explaining where he was traveling. The officer asked Johnson if he had ever been arrested, and Johnson responded, "no." Officer Daggs learned that Johnson's response was incorrect and asked Johnson if he had anything illegal in his vehicle. Johnson stated, "no." Officer Daggs specifically asked if Johnson had marijuana in his vehicle. Johnson again said, "no"; however, he pointed to the trunk. Officer Daggs asked Johnson for permission to search the trunk. Johnson agreed and executed a consent-to-search form.

When Officer Daggs opened the trunk he found two suitcases. Inside the suitcases he found multiple bricks that he believed to be marijuana.[1] Officer Daggs handcuffed Johnson and called another state trooper for assistance. Officer Daggs testified that the length of the stop was approximately five minutes.

Johnson was taken to the Johnson County Sheriff's Office where he was interviewed by Clarksville Police Officer Stewart Harness. Officer Harness read Johnson his Miranda rights at 3:20 p.m. Johnson executed a form explaining those rights and agreed to be interviewed. Johnson stated that he purchased the marijuana in El Paso, Texas, and paid

[1]The bricks were later confirmed to be fifty pounds of marijuana.

$100 for each of the bricks. At 3:29 p.m., Johnson advised that he did not want to make any further statements and wanted to speak with an attorney. Officer Harness stopped the interview.

At the hearing, Johnson testified that on the day in question, he was traveling to Georgia because his mother was having surgery.[2] He first observed Officer Daggs as he drove past Johnson and pulled into the median further down the interstate. After passing the officer in the median, Johnson observed Officer Daggs pull out from the median, drive up near Johnson, and motion for Johnson to pull over.

Officer Daggs told Johnson he had been pulled over for traveling too closely behind the vehicle in front of him. While he disagreed with the officer, Johnson testified that the did not voice his opposition; rather, he gave the officer his rental-car agreement. The officer walked to his patrol vehicle and returned ten minutes later asking if Johnson had ever been arrested, to which Johnson replied, "no." Johnson testified that the officer accused him of lying about his criminal history and asked Johnson to sign the consent-to-search form. Johnson testified that approximately ten to fifteen minutes passed between the time he was stopped and the time the officer asked him to search the vehicle.

Johnson's motion to suppress the marijuana and his statement to Officer Harness was denied by the trial court. The trial court found that Johnson was lawfully stopped for following too closely, that Johnson gave lawful, knowing, and intelligent written consent to

[2]Johnson's wife, Ambrosia Johnson, also testified that Johnson's mother had surgery in Georgia on August 31, 2005.

search his vehicle within fifteen minutes of being stopped, that no evidence of profiling existed, and that Johnson's statement at the sheriff's office was lawful. While the trial court found Johnson to be credible, the court specifically found that his claim that he requested an attorney and a phone call prior to meeting with Officer Harness incredible. The trial court also stated that between the testimony of the officers and Johnson, it found the officers' testimony more credible, stating that Johnson "has a lot to lose here. He's certainly a biased witness. He's looking at a class B felony here." On appeal, Johnson argues that the trial court erred in denying his motion to suppress.

In reviewing a trial court's denial of a motion to suppress evidence, we conduct a de novo review based on the totality of the circumstances, reviewing findings of fact for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by the trial court. *Baird v. State*, 357 Ark. 508, 182 S.W.3d 136 (2004). We reverse only if the trial court's ruling is clearly against the preponderance of the evidence. *Reeves v. State*, 80 Ark. App. 61, 91 S.W.3d 97 (2002). Because the determination of the preponderance of the evidence turns on questions of credibility and the weight to be given the testimony, we defer to the trial judge's superior position in this regard. *Id.*

Johnson's first assignment of error is that the trial court erred in denying his motion to suppress by finding that there was probable cause for the traffic stop. While Officer Daggs testified that he pulled Johnson over for following too closely, Johnson argues that testimony is subjective and "cannot be proved or disproved without belief of the officer."

In order to make a valid traffic stop, a police officer must have probable cause to believe that a traffic law has been violated. *Burks v. State*, 362 Ark. 558, 210 S.W.3d 62 (2005). Probable cause is defined as "facts or circumstances within a police officer's knowledge that are sufficient to permit a person of reasonable caution to believe that an offense has been committed by the person suspected." *Id*. at 559–60, 210 S.W.3d at 64.

Arkansas Code Annotated section 27-51-305 (Supp. 2007) provides that a driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of vehicles and the traffic upon and the condition of the highway. Here, Officer Daggs testified that he observed Johnson, for one mile, following too closely behind the vehicle in front of him. While Johnson may disagree with Officer Daggs's testimony, the trial court specifically found that as between the two parties, Officer Daggs was more credible. It is the province of the trial court, not this court, to determine the credibility of witnesses. *Welch v. State*, 364 Ark. 324, 219 S.W.3d 156 (2005). Therefore, we hold that the trial court's finding that Officer Daggs's traffic stop was supported by probable cause was not clearly against the preponderance of the evidence.

Johnson's second point on appeal, which is essentially an extension of his first point, is that the trial court erred in denying his motion to suppress because the traffic stop was not based on a legitimate traffic violation; rather, it was based on racial profiling. All that a valid traffic stop requires is that the officer have probable cause to believe that a traffic violation has occurred. *Laime v. State*, 347 Ark. 142, 60 S.W.3d 464 (2001). As set forth above, probable cause for the traffic stop existed in this case.

More specifically on the issue of racial profiling, the only evidence Johnson cites to in his brief for support of that argument are the facts that he is an African-American male and was driving alone in a rental car with a California license plate. None of the law-enforcement officers, nor any other witness, testified that the traffic stop was racially motivated. No statistical evidence of racial profiling in the Johnson County area was introduced. Based upon the validity of the traffic stop and the absence of evidence supporting the racial-profiling argument, we cannot say that the trial court's finding on this issue was clearly against the preponderance of the evidence.

Johnson's third point of error is that, assuming the initial traffic stop was valid, the marijuana should have been suppressed because Johnson was unreasonably detained. Rule 3.1 of the Arkansas Rules of Criminal Procedure addresses the validity of a detention without arrest:

> A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit ... a felony.... An officer acting under this rule may require the person to remain in or near such place in the officer's presence for a period of not more than fifteen (15) minutes or for such time as is reasonable under the circumstances. At the end of such period the person detained shall be released without further restraint, or arrested and charged with an offense.

Johnson contends that Officer Daggs detained him in excess of fifteen minutes. However, the suppression-hearing testimony of both Officer Daggs and Johnson established that Johnson was not detained in excess of fifteen minutes. Officer Daggs testified that approximately five minutes elapsed between the time he stopped Johnson and the time he obtained consent to search Johnson's vehicle. Johnson, when asked how long he was stopped

before he gave consent to search his vehicle, testified, "I would say approximately ten minutes, ten to fifteen minutes...." The trial court noted that the testimony on this issue was essentially undisputed—that Johnson was not detained in excess of fifteen minutes—and found that Johnson was not detained in violation of Rule 3.1. We hold that these findings were not clearly against the preponderance of the evidence.

Johnson next argues that the trial court erred in finding that Johnson's statements to Officer Harness were voluntary. Johnson testified at the suppression hearing that once he arrived at the sheriff's office, he asked to speak to an attorney and to make a phone call and that both requests were denied. His statement to Officer Harness, admitting that he purchased fifty bricks of marijuana from a man in Texas, soon followed. Based on these alleged facts, Johnson contends that his statement was not voluntarily given and should have been suppressed. For support, he cites to Rule 4.5 of the Arkansas Rules of Criminal Procedure, which provides: "No law enforcement officer shall question an arrested person if the person has indicated in any manner that he does not wish to be questioned, or that he wishes to consult counsel before submitting to any questioning." Ark. R. Crim. P. 4.5.

In reviewing a trial court's ruling on the voluntariness of a confession, we make an independent determination based upon the totality of the circumstances. *Grillot v. State*, 353 Ark. 294, 107 S.W.3d 136 (2003). A statement made while in custody is presumptively involuntary, and the burden is on the State to prove by a preponderance of the evidence that a custodial statement was given voluntarily and was knowingly and intelligently made. *Id.* In order to determine whether a waiver of Miranda rights is voluntary, this court looks to see

if the confession was the product of free and deliberate choice rather than intimidation, coercion, or deception. *Id*. We will reverse only when the trial court's finding of voluntariness is clearly against the preponderance of the evidence. *Harper v. State*, 359 Ark. 142, 194 S.W.3d 730 (2004). Conflicts in the testimony are for the trial court to resolve, and we will not reverse unless the trial court's finding is clearly erroneous. *Id*.

Officer Harness testified that he read Johnson his Miranda rights, Johnson executed the Miranda rights form (which was introduced at trial), and then agreed to be interviewed. The Miranda rights form was admitted into evidence. Officer Harness testified that Johnson told him where he got the marijuana, how much he had, and how much he paid for it. According to Officer Harness, the first time that Johnson requested an attorney was nine minutes into the interview. The officer also testified that during his short interview with Johnson, Johnson was responsive to questioning, did not have any difficulty understanding the questions, appeared to be oriented as to where he was and what was going on, and understood that he could ask to speak with an attorney because he did so shortly after the interview began.

As to any testimonial discrepancies between Johnson and Officer Harness, the trial court found that Officer Harness's testimony was more credible. Additionally, the trial court specifically found Johnson's testimony that he asked to speak with an attorney prior to being interviewed by Officer Harness was not believable. The trial court further found that Johnson was able to understand, speak, and read English, and knowingly and voluntarily signed a Miranda-rights form. Lastly, the trial court noted that Johnson knew how to stop the

interview by asking for an attorney, which he did. We cannot say, based on the totality of the circumstances, that the trial court's findings on this point are clearly erroneous.

For his final point Johnson argues that the trial court erred in finding that he gave voluntary, knowing, and intelligent consent to search his vehicle. He cites *Bumgardner v. State*, 98 Ark. App. 156, ___ S.W.3d ___ (2007), for the proposition that when a defendant is illegally seized at the time he consents to a search of his vehicle, his consent is not an act of free will, and the subsequently discovered evidence should be suppressed. There, the evidence demonstrated that law enforcement, after assessing a domestic-relation disturbance call, concluded that the defendant had not committed a crime, would not be arrested, and was free to leave the scene. However, the officers did not tell the defendant this. Instead, they continued to watch the defendant and twenty minutes after they arrived on the scene, eventually asked the defendant if they could search his vehicle under the pretense that they were looking for his wife's keys. The officers found drug paraphernalia during the search and arrested the defendant. On appeal, this court held that the defendant had been illegally seized at the time he consented to the search of his vehicle, and therefore, the drug paraphernalia should have been suppressed.

Bumgardner has no application to the case at bar. There is no evidence that Johnson was illegally seized at the time he gave Officer Daggs consent to search his vehicle. He was lawfully detained as Officer Daggs testified he pulled Johnson over for a legitimate traffic violation. Further, Johnson had not been illegally detained as he testified himself that he had been stopped only ten to fifteen minutes before he gave consent to search.

Johnson further argues that when considering the totality of the circumstances, "the officer's demeanor, the number of officers, his dress, stature, defendant's age, education and intelligence, advice that was given to the appellant, the length of his detention, and repeated lines of questioning," consent was not voluntarily given. Johnson argues that he was coerced into giving consent following a "heated exchange" he had with Officer Daggs after Johnson stated that he had not been arrested and Officer Daggs learned that was inaccurate.

An officer may conduct searches and make seizures without a search warrant or other color of authority if consent is given to the search. Ark. R. Crim. P. 11.1(a) (2007). The State has the burden of proving by clear and positive evidence that consent to a search was freely and voluntarily given and that there was no actual or implied duress or coercion. Ark. R. Crim. P. 11.1(b) (2007). The Supreme Court of the United States has held that the test for a valid consent to search is that the consent be voluntary, and "[v]oluntariness is a question of fact to be determined from all the circumstances." *Welch v. State*, 364 Ark. 324, 328–329, 219 S.W.3d 156, 158 (2005), citing *Ohio v. Robinette*, 519 U.S. 33, 40 (1996) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 248–49 (1973)). The trial court's determination on the issue of the validity of consent will not be overturned unless the trial court's determination is clearly erroneous. *Gonder v. State*, 95 Ark. App. 144, 234 S.W.3d 887 (2006).

The occurrence of a "heated exchange" between Johnson and Officer Daggs was disputed as the officer never testified that it took place. To the contrary, Officer Daggs testified that after he learned Johnson had been arrested, he asked Johnson if he had any

marijuana in the car to which Johnson said, "no," but pointed to the trunk. Officer Daggs further testified that Johnson willingly and voluntarily agreed to the search and signed the consent to search form. Much of Johnson's argument focuses on the credibility of the witnesses. The trial court clearly stated that he found the testimony of the officers more credible than that of Johnson. We are not at liberty to disturb credibility determinations on appeal. *Gonder*, 95 Ark. App. at 150, 234 S.W.3d at 893. Further, the trial court specifically found that Johnson was able to understand, speak, and read English; therefore, he willingly and voluntarily signed the consent-to-search form. Based on the totality of the circumstances, we hold that the trial court was not clearly erroneous in making this finding.

Affirmed.

BIRD and GLOVER, JJ., agree.